



ALERT: California Proposition 37

By many accounts, California voters currently support Proposition 37, the "Right to Know Genetically Engineered Food Act," [1] by a 2 to 1 margin. If passed, Proposition 37 would require clear and conspicuous labeling on foods produced through genetic engineering as of July 1, 2014. Its passage would undoubtedly give rise to an increase in food label litigation, not only after the labeling standard went into effect in July 2014 by challenges to labels that do not include a genetic engineering disclosure, but also the day after its passage for challenges to labels for processed food that includes the word "natural" on the label or advertising.

Challenges to Labeling of Genetically Engineered Food

If Proposition 37 passes, plaintiffs could simply shop their local grocer for foods that include commonly genetically engineered ingredients such as soy, corn, and sugar beets, and challenge any product that is not labeled. This would leave all producers and manufacturers exposed, even those who do not have genetically engineered ingredients in their products, because even if the company eventually gets out of the lawsuit by providing certifications that the ingredients are not genetically engineered, it still has the cost of defending the lawsuit up to that point. The costs of defending these actions would likely translate into higher grocery prices and hurt both consumers and the industry.

To avoid these costs, manufacturers that might otherwise use non-genetically engineered ingredients may choose lower-cost genetically engineered alternatives and label their products as such, rather than risk being the target of a lawsuit. They may also choose to prophylactically label all products as potentially containing genetically engineered ingredients.

Challenges to "Natural" Claims

In addition to the dangers associated with the failure to have a genetically engineered disclosure, Proposition 37 includes language that could preclude the use of the word "natural" or a similar term in retail food labeling and advertising in California for the following "processed food":

any food other than a raw agricultural commodity and includes any food produced from a raw agricultural commodity that has been subject to processing such as canning, smoking, pressing, cooking, freezing, dehydration, fermentation or milling

A plausible argument could be made, therefore, that applesauce made from 100% non-genetically engineered apples, or peanut butter processed exclusively from non-genetically engineered peanuts, could not be sold at retail with a "natural" claim in the State of California because the product has been subject to processing as defined under the statute. California's Legislative Analyst acknowledged this interpretation. His original "impartial" analysis reported:

In addition, the measure prohibits the use of the terms such as "natural," "naturally made," "naturally grown," and



"all natural" in the labeling and advertising of GE foods. Given the way the measure is written, there is a possibility that these restrictions would be interpreted by the courts to apply to all processed foods regardless of whether they are genetically engineered.

Proponents of Proposition 37 filed a successful lawsuit in Sacramento County, resulting in a write of mandate ordering the analysis to be amended to read:

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Any use of the word "natural" in labeling or advertising a processed food will be undoubtedly tested by plaintiffs and their counsel if Proposition 37 is passed.

In addition to creating a new private cause of action, Proposition 37 would encourage lawsuits by lowering a plaintiff's burden of proof. Plaintiffs do not need to show a lack of adequate remedy at law, any irreparable damage, or even any unique or special individual injury or damages in order to receive injunctive relief. Plaintiffs and their counsel would be further encouraged by Proposition 37's provision for attorney's fees and costs, including any cost of investigation.

Proposition 37 would also encourage private consumers to file Consumer Legal Remedies Act claims (codified at Calif. Civil Code § 1770) by eliminating plaintiff's burden of proof as to causation and by limiting the proof required to show damages. In this regard, Proposition 37 presents the same shortcomings found in California's original Unfair Competition Law ("UCL") that did not require a showing of damages or reliance on the alleged violation. As a result, voters passed Proposition 64 to stop "private attorneys who [] file frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit...where no client has been injured in fact."

If enacted, Proposition 37 would also give rise to a facile private cause of action under the UCL for product containing genetically engineered ingredients without a disclosure. False advertising claims are already brought under the UCL, but Proposition 37's standard would offer plaintiffs an easier basis for a UCL "unlawful prong" claim.

Another foreseeable battleground would be in determining the reasonable consumer standard that is applied to ascertain whether labeling or advertising is deemed to be false or misleading in UCL or CLRA lawsuits. Proposition 37 could lower or even shift plaintiff's burden of proof. Because Proposition 37 purports to define food that is more than minimally processed as non-natural, plaintiffs may try to rely on this as a universal finding of fact. They could argue that the people of California have spoken via the Proposition's factual findings, and determined that food more than minimally processed or containing any genetically engineered ingredient is not natural as a matter of law, and that they therefore no longer need to establish that a reasonable consumer would be misled by such claims. Significantly, while Proposition 37's labeling requirements would not take effect until July 1, 2014, there is no grace period for the Proposition's supposed factual findings -- plaintiffs could make this argument on November 7, 2012 if Proposition 37 passes.



In summary, Proposition 37 would provide creative plaintiffs and their attorneys with additional ammunition in their escalating war on food companies. Keller and Heckman's litigation department represents food company clients in CLRA, UCL, and FAL class actions, and is intimately familiar with these cases.

[1] The California Right to Know Genetically Engineered Food Act, available at <http://d3n8a8pro7vhm.cloudfront.net/labelgmos/pages/31/attachments/original/CA-Right-to-Know-Initiative12.pdf?1324916176>.